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November 18, 2010

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Via Electronic Filing

Re: Notice of *Ex Parte* Presentation in MB Docket 10-56, Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees

Dear Ms. Dortch,

Pursuant to section 1.1206(b) of the Commission's rules, Free Press and Media Access Project submit this notice regarding an *ex parte* communication in MB Docket 10-56, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*.

On November 17, 2010, Andrew Jay Schwartzman of Media Access Project (MAP), Adam Lynn, Joel Kelsey, and Corie Wright of Free Press met with the following FCC staff members: William Freedman, Marcia Glauberman, Judith Herman, Joel Rabinovitz, and Holly Sauer. Jamila-Bess Johnson and Erin McGrath participated by phone.

<u>Online Video</u>

In the meeting the public interest groups addressed a recent letter[1] in which Comcast purports to rebut the groups' August 2010 *Reply to Opposition to Petitions to Deny* and accompanying expert declaration.[2] In that filing, the public interest groups cited internal documents submitted by the Applicants to demonstrate the threat that the merger poses to the development of a competitive market for online video. In the meeting, Free Press and MAP supplemented the evidence they provided in the earlier *Reply* filing with an additional list of internal documents submitted by the Applicants pursuant to the FCC's second information request.[3] These documents only further add to the existing evidence demonstrating that Comcast perceives online video to be a threat to its facilities-based

[1] Letter from Michael Hurwitz to Marlene Dortch, MB Dkt 10-56 (Oct. 22, 2010).
[2] Reply to Opposition of Free Press, Media Access Project, Consumer Federation of America and Consumers Union, MB Dkt 10-56 (Aug. 19, 2010).
[3] *See* Federal Communications Commission, *Second Request for Information Sent to NBC Universal, Inc.*, MB Dkt 10-56 (Oct.4, 2010); *See* Federal Communications Commission, *Second Request for Information Sent to Comcast Corp.*, MB Dkt 10-56 (Oct.4, 2010). Response to Request for Information, filed by NBC Universal, Inc., MB Dkt 10-56 (Oct. 18, 2010); Response to Request for Information, filed by Comcast Corporation, MB Dkt 10-56 (Oct. 18, 2010).

MVPD services, and that NBCU's incentive to engage in online video distribution will be limited in the event it is acquired by Comcast. The list provided to FCC staff is as follows:

Comcast Documents

64-COM-00000012
64-COM-00000022
64-COM-00000230
64-COM-00000233
64-COM-00000242
64-COM-00000274
64-COM-00000282
64-COM-00000450
64-COM-00000457
64-COM-00000871
64-COM-00001369
64-COM-00001504
64-COM-00001506
64-COM-00001523
64-COM-00001549
64-COM-00001565
64-COM-00001583
64-COM-00001662
64-COM-00001714
64-COM-00001758
64-COM-00002014
64-COM-00002018
64-COM-00002078
64-COM-00002230
64-COM-00002275
64-COM-00002710
64-COM-00002747
64-COM-00002841
64-COM-00002906
64-COM-00003275
64-COM-00003281
64-COM-00003819
64-COM-00003825

NBC Universal Documents

60nbcu0000031
60nbcu0000443
60nbcu0000135
60nbcu0000159
60nbcu0000080
60nbcu0000943
60nbcu0001173

60nbcu0001687
60nbcu0001688
60nbcu0001691
60nbcu0000776
60nbcu0000741
60nbcu0000714
62nbcu0000489
68nbcu0000259
68nbcu0000193
60nbcu0000632
60nbcu0000550
60nbcu0000551
60nbcu0000552
60nbcu0000517
60nbcu0000425
60nbcu0000417
68nbcu0000264
68nbcu0000252
68nbcu0000182
68nbcu0000387
68nbcu0000075

MAP and Free Press explained that record evidence shows that the emerging market for online video, while nascent, holds the potential for substantial growth and poses a direct competitive threat to large cable operators such as Comcast. They also explained that Comcast can complement its ability to withhold its own content by using its position as the dominant cable operator to pressure unaffiliated programmers into exclusive deals that prevent them from making their content available to Comcast's online-only competitors. The groups highlighted a recent *ex parte* letter filed by the online television provider, ivi.tv, in which it explained its frustration with "contractual roadblocks that Comcast has placed in their contracts with cable channels that limit their ability to access other distribution vehicles created by new technology."[4] ivi.tv's experience suggests that these types of limitations are commonplace terms in Comcast's program carriage contracts. Free Press and MAP expressed concerns that the evidence submitted by the Applicants in the docket does not reflect the extent of this practice because Comcast has still failed to submit documents responsive to a May 2010 Commission information request which, among other things, sought:

> [A]ll agreements currently in effect and all agreements executed since January 1, 2006 that the Company has entered into with any provider of Video Programming which discuss cable network carriage, retransmission

[4] Memorandum of Ex Parte Presentation to the FCC of Todd Weaver, CEO of ivi.tv, MB Docket 10-56 (Nov. 10, 2010).

consent, program carriage, and distribution rights for Video Programming.[5]

Rather, than submit to the Commission's request, Comcast's response to this interrogatory is as follows: "Pursuant to discussions with Commission staff, the response to this request has been deferred pending further review and consultation."[6] Without access to such contracts it is impossible to determine the exact extent to which Comcast limits programmers' ability to distribute their content via the internet. Consequently, in the meeting, Free Press and MAP urged the Commission to secure these contracts for review.

Retransmission Consent

Free Press and MAP also raised concerns about the merger's effect on retransmission consent negotiations. In acquiring NBCU's 26 broadcast stations, Comcast will gain a double incentive to drive-up its rivals' costs for NBC broadcast signals: first, not only does the conglomerate benefit from securing increased fees, but higher rates will force Comcast's cable competitors to absorb these costs, or to pass them onto consumers. This will result in higher bills for consumers who subscribe to rival services. Moreover, in the event that competing pay-TV providers will not or cannot meet these increased demands, Comcast can simply pull NBC broadcast content from a competitor's pay-TV platform and can also block subscribers' access to Hulu or NBC.com. Indeed, a merged Comcast/NBCU actually stands to profit from withholding programming if retransmission consent negotiations fall apart because it can gain subscribers from its MVPD competitors by offering exclusive access to NBC programming during the dispute.

KWHY-TV Divestiture Trust

Free Press and MAP also reiterated concerns with the inadequacy of the "divestiture trust" that the merger Applicants have proffered to bring them into compliance with the Commission's multiple ownership rules. Specifically, NBCU has been in violation of local television ownership rule for eight years through its control of a triopoly television combination in Los Angeles which was created when it purchased Telemundo in 2002. Moreover, NBCU has failed to comply with an eight year-old FCC order requiring NBCU to divest one of these stations. The Applicants have now made what purports to be a promise to divest the Spanish language station KWHY-TV.

Free Press and MAP recognize that NBCU and Comcast have recently amended the terms of the divestiture trust to respond to several issues that the public interest groups had raised previously.[7] While these revisions are certainly an improvement over the initial terms of the trust agreement, Free Press and MAP remain skeptical. NBCU promised to divest KHWY during the last major merger it was involved in. Eight years

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[5] Federal Communications Commission, *Request for Information Sent to Comcast Corporation*, MB Dkt 10-56 (May 21, 2010) at Question 44.

[6] Supplemental Response to request for Information filed by Comcast Corp. (Jun 30, 2010)

[7] Letter from Mike Hammer to Marlene Dortch, MB Dkt. 10-56 (filed Nov. 9, 2010).

later it has still failed to comply. Given NBCU's track record, there is little to suggest that its performance will improve this time around. While Free Press and MAP remain opposed to the merger, in the event that it is approved, the FCC should require divestiture of the station prior to consummation of the transaction. Furthermore, with regard to any conditions the FCC may decide to impose on the transaction, Applicants' compliance those conditions should be tied the broadcast license renewal cycle that begins Oct. 1, 2019. Additionally, the public interest groups urged the FCC to promptly initiate enforcement proceedings against NBC for continued violation of the Commission's order and rules, regardless of the ultimate disposition of the merger proceeding.

Finally, Free Press and MAP stressed that the Communications Act requires merger applicants to demonstrate that the proposed transaction, on balance, will serve the public interest goals of competition, diversity and localism. Moreover, Comcast and NBCU must demonstrate that the merger would *enhance* public interest goals, and not merely preserve the *status quo*. Because the Applicants have not shown that the proposed transaction meets the requisite public interest standard mandated by the Communications Act, the transaction should not be approved by the Commission.

In accordance with the Commission's rules, this *ex parte* notice is being filed electronically in the above referenced docket. If you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,
______/s/___________

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